No 902

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

HARRY C. BARKER,
Petitioner,

vs.

MORRIS J. LEVIN, Trustee in Bankruptcy of Harold J. Kattelman, Doing Business as H. J. Kattelman Company, Bankrupt,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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STATEMENT OF THE CASE.

On February 27, 1941, after due notice to creditors, a hearing was held before Hon. Elmer E. Pearcy, Referee in Bankruptcy for the Eastern Division of the Eastern Judicial District of Missouri (R. p. 52), on the allowance of fees in the bankruptcy case of Harold J. Kattelman, doing business as H. J. Kattelman Company. Among the petitions for allowance heard by the Referee on that day was that of Harry C. Barker, attorney for the Receiver in Bankruptcy, who had asked for $12,500.00 for his services rendered over a period of twenty months (from July 19,

1935, until March, 1937) after the filing of the petition in bankruptcy. Sixteen months of that period were after the appointment of the Trustee in Bankruptcy (R. pp. 5, 32, 33). Mr. Barker's petition had been filed on June 24, 1938, and on the following day was referred to the Referee by the District Court (R. pp. 20, 56), and was heard in the course of the proceedings in said cause before the Referee. Also heard at that time were the petitions for allowance filed by the Receiver and the Trustee, who asked for their statutory commissions, the accountant, who audited all of the bankrupt's customers' accounts for the Trustee for a stipulated compensation, the attorney for the Trustee, who asked for $10,000.00, and the attorneys for the petitioning creditors, who asked for $3,000.00. All of these petitions were heard that day by the Referee and the following allowances were made (R. pp. 52, 53):

William S. Madden, Receiver.....	$ 720.55
Morris J. Levin, Trustee.....	726.22
James C. Thompson, accountant.....	2,162.00
Harry C. Barker, attorney for Receiver.	5,000.00
Ellison A. Poulton, attorney for Trustee	7,500.00
Attorneys for Petitioning Creditors....	1,000.00
	$17,108.77

Mr. Barker, the petitioner herein, filed a petition for review of the Referee's order allowing him $5,000.00, but no other petitions for review were taken from any of the other allowances.

Thereafter, on March 11, 1941, the Referee in Bankruptcy certified to the District Court the question of the correctness of the Referee's order fixing the allowance to Mr. Barker at $5,000.00, and the Referee made the following findings of fact:

> "Allowances and expenses made and approved for payment at said meeting would not only exhaust all

the moneys in the estate, but would require an assessment against the property sought to be reclaimed of approximately 13 per cent of the value thereof. Under these circumstances, the fair value of the services of Mr. Barker, the Referee found, was $5,000.00'' (R. pp. 56, 57).

On April 5, 1941, the petition for review was argued before the Honorable George H. Moore, District Judge. No new evidence was presented and no findings of fact were made (R. pp. 58, 59). By an order filed April 5, 1941, said petition for review was sustained, and the order of the Referee was amended to allow appellee herein the sum of $10,000.00 for his total fee (R. pp. 59, 60).

Thereafter Morris J. Levin, trustee of said bankrupt estate, appealed to the United States Circuit Court of Appeals for the Eighth Circuit from the order of the District Court increasing the allowance, and the said order of the District Court was reversed and the case remanded to the District Court, with directions to enter an order confirming and approving the order of the Referee, allowing Mr. Barker the sum of $5,000.00 for his services. The opinion of the United States Circuit Court of Appeals is reported in 122 F. (2d) 969.

ANALYSIS OF THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The petition for writ of certiorari and brief filed by petitioner herein failed to analyze the opinion of the Circuit Court of Appeals to determine the actual holding of the case. A full understanding of the rule of law upon which the opinion is based and its application to the facts in this case will dispose completely of petitioner's objections.

The specific holding is quite short. In the opinion it will be found immediately after the Court's discussion of

the motion to dismiss filed by the petitioner. That motion to dismiss was held to be without merit and denied. The Court then went on to hold as follows (R. pp. 71, 72):

> "Section 47 of the General Orders in Bankruptcy, which in its present form became effective February 13, 1939, 11 U. S. C. A., following section 53, provides as follows: 'Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous.'
>
> "The referee, as already pointed out, made findings of fact and conclusions of law and **when the matter came before the judge for review the question presented was whether or not these findings were clearly erroneous. The judge made no finding on this issue** but simply entered an order modifying the order of the referee by increasing the allowance of attorney fees. It is argued that the findings of the trial court are to be accepted on appeal unless clearly erroneous, but here the trial court made no findings, and if we clothe the order appealed from with the presumption of correctness, that presumption is weakened by the fact that **the court made no finding on the direct issue and its order is in conflict with that entered by the referee, which latter order is based upon proper findings.**" (Emphasis ours.)

The opinion below, it is seen, is based upon the General Orders in Bankruptcy of this Court, which require the District Judge to accept the findings of the Referee unless he finds them to be "clearly erroneous." The District Court in this case made no findings whatever, but simply doubled the allowance made by the Referee. The opinion of the Circuit Court of Appeals, as will be noted from that portion quoted above, carries out the intention of Section 47 of the General Orders in Bankruptcy. It holds that the order of the Referee, which was supported by findings of

fact, should be affirmed, since the order of the District Court purporting to overrule it made no findings of fact. There was nothing which would support a conclusion that the Referee's findings were "clearly erroneous." The opinion was a correct interpretation of General Order in Bankruptcy No. 47 of this Court, which directs that the Referee's findings must be adopted unless they are found to be clearly erroneous. As the opinion stated, the District Court made no finding on the direct issue of whether error was clearly present in the findings of the Referee.

Having decided the case upon this simple principle of law, the remainder of the opinion is a discussion as to whether the District Court, had it passed upon the issue, could have found the allowance made by the Referee to be "clearly erroneous." The Court first cites decisions of the Eighth Circuit and of this Court, condemning the allowance of extragavant fees and stressing the necessity of protecting estates from "vicarious generosity in the matter of attorney fees" (R. p. 72), and makes the point that if the District Court's allowance of $10,000.00 to Mr. Barker were permitted to replace the allowance of $5,000.00 made by the Referee, the expenses of administration would exceed 50 per cent of the assets. As the Court states (R. p. 73):

> "Some regard must be had for the ability of the client to pay and also for the 'economic spirit of the Bankruptcy Act.'"

The opinion then goes on to deny Mr. Barker's claim that an attorney for a Receiver in a bankruptcy case is entitled to priority in payment of his fee as compared with the Trustee, the Trustee's attorney and the other administrative officers, and points out that "attorney fees may only be allowed in bankruptcy proceedings as provided in the Bankruptcy Act" (R. p. 73). The Court then discusses petitioner's contention that his services should be rewarded upon a more liberal basis than they were ordi-

narily worth because of Mr. Barker's claim, as expressed in his brief in the Circuit Court of Appeals, that his compensation was to be "not only contingent—the chances against any compensation at all were astronomical." The Court states that there were assets in the hands of the Receiver in the normal course of administration within a few days and these assets negatived the claim that his employment was on a contingent basis.

Continuing, the Court apparently concludes that the District Judge could not properly have found the Referee clearly in error, for the allowance made by the Referee was liberal in view of the amount of moneys attributable to Mr. Barker's efforts. In conclusion, the opinion points out that in any event the rendition of services by the Receiver and his attorney after the appointment of a Trustee should not become additional expense to burden the estate.

The Circuit Court of Appeals thereupon reverses the District Court and directs it to enter an order confirming and approving the order of the Referee.

ARGUMENT.

The foregoing analysis indicates that petitioner's repeated declarations that the holding of the Circuit Court of Appeals is based "on the merits on the facts" (Pet. Brief pp. 5, 10 et ff.) are unfounded. Such assertions ignore the actual holding which simply applies to the facts of this case General Order in Bankruptcy No. 47. If petitioner's analysis was correct, then it seems logical that instead of affirming the order of the Referee, as it did, the Circuit Court of Appeals would have made an independent finding of fact as to the value of the services, so that its holding would then be "on the merits on the facts." Petitioner's argument reduced to its logical conclusion would prevent any appellate court from considering, even by way of dictum, the **factual** basis of the holding of any inferior court whose judgment it is called upon to review.

As to the specific questions raised by petitioner, these can be disposed of briefly in the light of the above discussion:

Question 1—The Appellant Was Not Aggrieved. The Trustee is no volunteer in this cause, as the opinion below makes clear:

> "Appellee has moved to dismiss the appeal on the ground that the trustee is not an aggrieved party. The order appealed from adjudged that Harry C. Barker 'have and recover of the bankrupt estate the balance of the fee hereinbefore allowed him as attorney, to-wit: the sum of $7,500.00.' The bankrupt estate acts only through its trustee. If the bankrupt estate is the aggrieved party, the trustee as its representative is the proper party for prosecuting the appeal. 8 Remington on Bankruptcy, 4th Ed., Sec. 3634; Chatfield v. O'Dwyer, 8 Cir., 101 F. 797, 799. In the last-cited authority it is said: 'The trustee is elected by, and is the representative of, the creditors;

and, following the general analogies of the law, he is the appropriate person to see that no unjust or fictitious claims are allowed to be paid out of the assets in his hands.'

"The motion to dismiss is without merit and is therefore denied."

By the most elementary conceptions of bankruptcy law the Trustee in Bankruptcy is the proper party to resist an order affecting "the bankrupt estate."

Question 2—The Record Did Not Authorize a Review of the Facts. Petitioner complains that he has been injured by the inadequacy of the record of the proceedings before the District Court because it did not contain any certificate or transcript of the evidence heard there, thus constituting a "special procedure whereby the Court of Appeals reviewed directly the proceedings of the Referee" (Pet. Brief, p. 18). The answer to this contention is twofold: For one thing, **there was no new evidence heard by the District Court.** The docket entry (R. pp. 58, 59) shows that the petition for review was simply argued and submitted without the introduction of any further evidence. But even were this not the case, petitioner quotes Rule 13 of the Eighth Circuit Court of Appeals on page 44 of the appendix to his brief, reading as follows:

> "In * * * all civil cases, appellant may file, at the time the typewritten or manuscript transcript is filed with the clerk of this court, a designation of the parts of the record he thinks material for consideration of the errors assigned (in criminal and bankruptcy cases) or the points relied upon (in civil cases), and such statements shall include proof of service of a copy thereof upon adverse parties or their counsel. Such adverse parties or counsel may, within ten days after the above service, file with such clerk a designation of such additional parts of the record as they think material. **A failure to file either of the above designations at the**

above times shall be deemed a waiver thereof. If designations are made, the clerk shall print those parts only; and the court will consider only the record as thus printed." (Emphasis ours.)

Pages 63 and 64 of the record show the Designation of Contents of Transcript on Appeal, as served upon petitioner herein by the Trustee's attorney on May 12, 1941. Under the rule above quoted petitioner had the opportunity of including in the transcript whatever parts of the record he wished containing material which would assist the presentation of his case before the Circuit Court of Appeals. Petitioner should not now cast upon this Court the duty of conjecture as to what that record might have shown had he exercised his prerogative. However, we are at a loss to know what evidence before the District Court could have been preserved in the record, because Mr. Barker's petition for review was simply argued by counsel before the District Court and no testimony was taken.

As to the Court's reliance upon facts *de hors* the record, petitioner argues that this Court will grant certiorari "on the sole ground that it was merely alleged that the Court of Appeals **had considered** matters not in the record" (Pet. Brief, p. 39). His authority, however, is based upon a case in which this Court found that the Circuit Court of Appeals **"had based its decision"** on a point not presented or argued by the litigants. Letulle v. Scofield, 308 U. S. 415, 84 L. Ed. 355.

A reference to the opinion of the Circuit Court of Appeals herein shows that the Court's holding follows the two points briefed by the trustee in bankruptcy in prosecuting his appeal from the order of the District Court. These points were:

"The Findings and Allowances of the Referee in Bankruptcy Are Entitled to the Weight of a Jury

Verdict, and Should Not Have Been Disturbed by the District Court Unless 'Clearly Erroneous.' ''

''The Order of the Referee Was Not So 'Clearly Erroneous' as to Confer Upon the District Court the Authority to Reverse It, but Was Instead a Reasonable and Fair Allowance in View of the Size of the Estate, the Amounts Allowed to Other Claimants and the Duration and Character of the Services Rendered.''

We have already pointed out that these two points are the legal basis upon which the Circuit Court of Appeals "had based its decision." It is significant, as shown in its opinion, that the Circuit Court of Appeals "had considered" the fact that the petitioner was claiming compensation for services rendered after the appointment of the Trustee, but declined to ''base its decision'' thereon. In the same category is the Court's reference to the value of certain assets, amounting to some $16,000, which assets came readily into the possession of the Receiver in Bankruptcy, as indicated by his own admissions in his written application for allowance (R. pp. 6, 10, 11) and in his testimony before the Referee (R. pp. 43, 44).

Question 3 — Priority. The petitioner first made his claim for priority in the Circuit Court of Appeals. He did not ask for it in his original application for allowance (R. pp. 5-20, incl.). He did not raise the question at the hearing before the Referee, nor before the District Court. The District Court did not order priority to be given petitioner's claim in increasing his allowance, and petitioner does not state wherein the Bankruptcy Act gives to his claim a priority over the fees of the other court officers and of other administrative expenses. This objection is not seriously pressed and need not be seriously answered.

Question 4 — The Referee's Jurisdiction. In spite of the fact that Mr. Barker proceeded with the hearing on his

application for allowance before the Referee in Bankruptcy without any objection to the Referee's jurisdiction, produced his evidence before the Referee, took a petition for review from the Referee's order to the District Court without once raising any question as to the Referee's jurisdiction (R. p. 54)—in spite of all this—Mr. Barker now complains of the Trustee's failure to include in the record a copy of the general order of reference. It is significant that even here he does not allege affirmatively that the Referee **lacked** jurisdiction, but only that the formal order of reference is not in the record. What was said as to question 2 concerning waiver of the right to file designations of the record certainly applies here with equal force.

CONCLUSION.

The facts of this case do not present an appealing picture for the allowance of the extraordinary remedy of certiorari. The assets of this bankrupt estate have been in the custody of the bankruptcy court since 1935, and in closing up the estate, fee allowances have been made with due consideration to the value of the services rendered and the total amount of assets remaining. From these allowances only one petition for review was taken by dissatisfied counsel, and final distribution of the estate has been held up while first the District Court, and then the Circuit Court of Appeals, considered the issues raised thereby. Still dissatisfied, Mr. Barker seeks to make this Court the fourth successive tribunal to consider whether he shall be allowed $5,000.00 or $10,000.00 for his services. Meanwhile, distribution of the estate to its creditors is held up while Mr. Barker has his day in court.

No conflict of decisions could possibly be present between the opinion of the Circuit Court of Appeals herein, and the decision of any other court; the value of an attorney's services is unique in every case, and falls peculiarly within

the discretion of the tribunal having jurisdiction thereof. The amount of Mr. Barker's fee is not an important question of federal law, as that phrase is used to justify the granting of certiorari; nor have the Courts below committed such departure from "the accepted and usual course of judicial proceedings" as to invoke the remedy sought. In deciding this cause below, the Circuit Court of Appeals has spoken with the language of this Court by applying General Order in Bankruptcy No. 47 in the manner intended by this Court. It is respectfully submitted that petitioner's application for writ of certiorari should be denied.

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